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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1143~~ 243

KITTIEBELL G. MAJESIC, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Claims

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v.

UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Claims

To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petitioner, Kittiebell G. Majesic, plaintiff below, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered on January 16, 1957 (R 56).

OPINIONS BELOW

The opinion of the Court below has not as yet been reported. It is set forth at pages 5-11 of the appendix hereto.

JURISDICTION

The judgment of the Court of Claims was entered on January 16, 1957 (R 56). Plaintiff's motion for a rehearing was overruled on April 3, 1957 (R 66). This

petition for a writ of certiorari is filed within a period of 90 days thereafter pursuant to the provisions of Title 28, Section 2101(c) of the United States Code. The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1255(1) of the United States Code. The Court below had jurisdiction under the provisions of Title 28 Section 1491 of the United States Code.

QUESTIONS INVOLVED

1. Whether there was a genuine issue of fact in this case which had not been resolved when summary judgment was entered.

2. Whether the limited administrative remedy available to a non-veteran civil service employee must be exhausted before suit for illegal removal from Federal employment.

STATEMENT OF THE FACTS

The case was disposed of in the Court below on motion for a summary judgment on a record consisting of the pleadings and certain affidavits. In such circumstances the facts asserted both in the complaint and in plaintiff's affidavits are to be regarded as true and they are accordingly recited here as though established.

The petitioner prior to March 9, 1951 was employed as a civil service employee of the United States at the Brooke Army Center at Fort Houston, Texas (R 1). She had been so employed for about ten years, during all of which time her efficiency rating had been very good or excellent (R 2). Prior to March 9, 1951 certain of petitioner's superiors and others in concert with them spread false rumors throughout the personnel of the Brooke Army Medical Center that the petitioner was a disloyal person, calling her many vile and vicious names which are enumerated in paragraph 4 of the complaint (R. 2). On March 9, 1951 she was caused to resign her position

through fraud, deceit and duress practiced upon her by her superiors (R 3). Details of the fraud, deceit and duress are set forth in an affidavit filed by her in opposition to the motion for summary judgment (R. 45-47). Respondent invokes charges filed against petitioner for her removal from her position on February 28, 1951, nine days before her resignation (R 5).

Details of the alleged fraud, deceit and duress practiced on petitioner are set forth in an affidavit filed in opposition to respondent's motion for summary judgment (R 45-47). They disclose, among other things, that shortly before the charges were filed against her she sought the services of the Inspector General which were denied her. After the charges were filed the Inspector General told her that rules for her protection were to be disregarded and she was referred, pursuant to official orders, to the Building Inspector. The latter undertook on petitioner's behalf to request a Board of Inquiry. This and another request, that for a Grievance Board hearing, were "flatly refused". Also, petitioner's written denial of the charges was denied acceptance. The Building Inspector suggested that she resign or "just get out" and forget that she had been mistreated. He also agreed that regulations were being violated adversely to her but told her that she was to be persecuted as an example or for some other reason unknown to him (R 45).

Petitioner attempted to see the Personnel Officer but he was "too busy" to see her (R 45-46). Later, in telephone conversation, the Personnel Officer refused to provide her copies of regulations necessary to prepare her answer to the charges. Also, she was denied access to a written report relied upon in the letter of charges against her to establish that she had committed serious errors. He told her she would be "smart to get out". A personnel action form, read publicly, stated that petitioner was being removed for "undesirable traits of char-

acter." She was warned that if she expected to remain in her position she would have to withstand attacks on her character at regular and unexpected intervals. Again she was told by her superior that she would have no grievance board, no hearing of any kind and no appeal rights. She was also told that her answer to the charges would be considered only if the charges were answered in full, but that it would make no difference whether she admitted or denied the charges because the letter for her removal had already been written (R. 46).

It was under these circumstances that petitioner resigned on March 9, 1951 without answering the charges against her. Subsequent investigation by the Inspector General found an absence of any evidence to show that petitioner was disloyal to the United States and all statements to the effect that she was a disloyal person were ordered stricken from her record (R. 3, 6).

The Court below granted respondent's motion for summary judgment on the grounds that all of the facts shown on the record did not state a cause of action and that in any event dismissal of the complaint was required because petitioner had not exhausted her administrative remedies before coming into Court. (Appendix, *infra* p. 10.)

SPECIFICATION OF ERRORS TO BE URGED

Petitioner will urge that the Court below erred:

1. In holding that the facts asserted in the complaint and in supporting affidavits did not state a cause of action.

2. In holding that petitioner could not maintain this suit for her failure to exhaust administrative remedies.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted under Rule 19 1(b) of this Court. The Court below has decided im-

portant questions of federal law which have not been, but should be settled by this Court.

1. The Court below has held that resignation from federal service obtained by fraud, deceit and duress practiced by responsible government officials is not a separation in violation of the Lloyd-LaFollette Act which provides as follows:

> "No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing." (5 U.S.C. 652(a))

This interpretation of the Lloyd-LaFollette Act is a departure in principle from earlier holdings by the same Court. Thus in *Gadsden* v. *United States* 111 Ct. Cl. 487, 489-490, it was stated that "if the administrative officer did not act in good faith, if he in fact did not discharge the employee for cause which would promote the efficiency of the service, but if, on the other hand, he was motivated alone by malice toward the employee, there would seem to be but little doubt that the employee's rights under the act of 1912, have been violated. * * * Both this Court and the Supreme Court have many times held that if the decision is arbitrary or capricious or so grossly erroneous as to imply bad faith, it will be set aside." See also *Knotts* v. *United States*, 128 Ct. Cls. at page 489.

In the present case we are not left with any implication of bad faith. Assuming as true the allegations in the record before us, bad faith in fact existed by reason of deceit, fraud and duress. Intervention of this Court is necessary to clarify the confusion arising from inconsistency in the Court below and to insure against improper application of the statute governing removal of federal employees from their positions.

2. The Court below has held that the limited and discretionary administrative remedy for a discharged non-veteran federal employee must be exhausted before suit is brought. It has relied primarily upon the remedy before the Civil Service Commission (R 56). However, an appeal to the Civil Service Commission provides no remedy at all for a non-veteran employee seeking a judgment for back salary. There is no statutory remedy for such an employee before the Civil Service Commission. This is emphasized by contrast with the remedy available to veterans. Section 14 of the Veterans Preference Act of 1944 provides for orders by the Commission to administrative officers and that "it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends." (5 U.S.C. 863)

By regulation of the Civil Service Commission, the Commission "may investigate" claimed illegal removal of a non-veteran employee (5 C.F.R. 9.105). It has no authority to make any decision or to enter any order binding upon the agency. Its recommendations need not be followed by the agency. *Roth* v. *Brownell* 117 F. Supp. 362, reversed 245 F.(2d) 500 cert. den. 348 U.S. 863. Neither the Commission nor the District Court can grant judgment for lost salary, the relief prayed for in the present case. (28 U.S.C. 1346(d)(2)). Even if, as the result of administrative or even judicial action, the employee is restored to his position, payment of back salary does not follow and suit to recover it in the Court of Claims is required. *O'Brien* v. *United States*, 124 C. Cls. 655, *Cuiffo* v. *United States* 131 C. Cls. 60.

Whether failure to exhaust this very limited administrative remedy leading at best to relief not sought in the Court of Claims, may be invoked to prevent suit in that Court is a question vital to federal employees. It should be clarified by this Court. The Court below has recognized no distinction between decisions and manda-

tory orders as a matter of right under the Veterans' Preference Act and discretionary investigation under the Lloyd-LaFollette Act. Without comment as to this difference, the Court has invoked veterans' cases entirely in support of its holding in this non-veteran case. (Appendix *infra* p 10).

In its consideration of the administrative remedy the Court below apparently disregarded any such remedy the petitioner may have had within the Department of the Army. Under the facts of this case, it would have been improper to hold that petitioner must have exhausted the remedy there. The facts asserted, and on summary judgment to be regarded as true, show that the remedy within the administrative agency was no remedy at all, because its effectiveness was fully negatived by deceit, fraud and duress.

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 433-55

KITTIEBELL G. MAJESIC

v.

THE UNITED STATES

(Decided January 16, 1957)

Mr. Claude L. Dawson, for plaintiff.

Mr. Lino A. Graglia, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for defendant.

On Defendant's Motion for Summary Judgment

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues for her salary from the time of her alleged illegal discharge. Defendant filed a motion for summary judgment.

Plaintiff alleges that her superiors "wilfully, wickedly and maliciously spread false rumors" about her throughout the place where she was working, and addressed her in foul and profane language, which so intimidated her that when they demanded her resignation on the threat of preferring charges against her that she acceeded to their demands and resigned.

Later, she alleges, Lieutenant General Daniel Noce, as an Inspector General, investigated the charges against her and determined they were false, and ordered them stricken from plaintiff's personnel records.

These allegations form the basis for her claim that she was illegally separated from the service. However, the defendant in its answer alleges that ten days prior to plaintiff's resignation she was served with a 10-page specification of charges proposing her removal, effective at the close of business March 31, 1951, and that these charges were, among other things, that she had been wasting Government time and money, had been creating an adverse effect on the morale of the personnel at the center, and had been inefficient and disloyal to the Brooke Army Medical Center, where she worked.

It further appears that after the Inspector General's report a notation was made on her personnel record deleting from the statement on the original "notification of personnel action" the following:

> Resigned while action pending to separate for disloyalty to Brooke Army Medical Center, for wasting Government time and money, for creating an adverse effect on morale of the personnel at the Center, and for ineffciency.

Defendant, however, attaches an exhibit to its motion, which shows that her letter of resignation was handed in "upon professional advice" and that in it she stated:

> Moreover, I assure you I appreciate the opportunity of having been in contact with a friendly and considerate staff at Brooke and will always remember the very many kindnesses extended me.

Defendant's motion is based upon the grounds: (1) that the petition fails to state a cause of action in that it does not show that she was illegally discharged; (2) that the petition shows that she failed to pursue her administrative remedy; and (3) that she was guilty of laches.

It is not questioned that plaintiff failed to pursue her administrative remedy within the Department of the Army, and also that she did not do so before the Civil

Service Commission. Instead, she resigned.

Defendant well says in its brief:

> * * * Plaintiff had only to retain her position and answer these charges [that had been preferred against her, of circulating malicious rumors about her and using abusive language toward her] to insure that the entire matter would be brought to the attention of proper officials. Instead she chose, on the advice of her attorney, to avoid the charges by resigning her position. She now, nearly five years later, seeks to challenge the validity of her resignation by means of a suit for back pay in this court. It is obvious that such a course, if permitted, would result in the disruption of the Government service, impose a burdensome liability on the Government, and deprive the Government of the opportunity to immediately investigate and correct any impropriety that may have taken place.

Inasmuch as her letter of resignation was submitted "upon professional advice" and in view of her statement of appreciation of the "friendly and considerate staff at Brooke", and for "the very many kindnesses extended me," we do not think her petition makes a case of a resignation induced by duress.

But whether we are correct about this or not, we think defendant's motion for summary judgment must be granted on the ground that plaintiff failed to pursue her administrative remedies. The Civil Service Commission was set up to hear the grievances of employees. Congress contemplated that an aggrieved employee should appeal first to this Commission before coming into court. *Heffernan* v. *United States*, 133 C. Cls. 839; *Martilla* v. *United States*, 118 C. Cls. 177; *Johnson* v. *War Assets Administration*, 171 F. 2d 556; *Luther B. Cannon, et al.* v. *United States*, C. Cls. No. 397-52, and related cases No. 542-52 and No. 82-53, decided December 5, 1956.

It results that defendant's motion for summary judgment must be granted, and plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

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IN THE

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October Term, 1957

No. [redacted] 243

KITTIEBELL G. MAJESIC,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1957

No. 1143

KITTIEBELL G. MAJESIC,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI

The petitioner has deemed it necessary in order to get the true facts before this Court to file this reply brief.

The brief of the government relies principally on the grounds that the petitioner failed to exhaust administrative remedies. In the opinion of the Court of Claims (A. 10) it is stated that the Civil Service Commission is set up to hear grievances of employees, and that the petitioner could have appealed to that Commission. In making this statement, the Court below overlooked the fact that the petitioner was not a veteran preference eligible and not entitled to appeal to the Commission except

for procedural errors. The Civil Service Commission had no authority under the law to go into the facts of petitioner's case or order the reinstatement of the petitioner except for procedural errors. In plain words, the Civil Service Commission had no authority under the law to consider the charges against the petitioner. It could only check to see that the provisions of Title 5, U.S.C. 652 relative to the charges were complied with as required by that statute.

The petitioner did appeal to the Civil Service Commission before and after the charges were filed.

It is insisted that she also had a right to show that the letter of resignation signed by her was not written by her but signed only under duress.

The government's brief relies on the defense of laches. It contended that the petitioner waited four and one-half years before prosecuting her claim. This is not a correct statement of fact. No person could have been more diligent in prosecuting her claim. The petitioner was not cleared of disloyalty charges until March 3, 1953 which was two years after the date she was discharged from the service, and the remainder of the time up until the suit was filed was spent by the petitioner in trying to clear her records in accordance with her clearance of the charges of disloyalty which occurred, as stated above, on March 3, 1953. There is no merit to the contention that the petitioner's cause of action was barred by laches.

Respectfully submitted.

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FILED
AUG. 1 1957
JOHN T. FEY, Clerk

No. 243

In the Supreme Court of the United States

OCTOBER TERM, 1957

KITTIEBELL G. MAJESIC, PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 243

KITTIEBELL G. MAJESKE, PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 8-11) is reported at 147 F. Supp. 737.

JURISDICTION

The judgment of the Court of Claims was entered on January 16, 1957. A motion for rehearing, timely filed, was denied on April 3, 1957 (R. 66). The petition for a writ of certiorari was filed on July 2, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction to entertain a suit for back salary based on the alleged invalidity of a resignation from Government employment.

2. Whether a failure to exhaust administrative remedies bars a suit for back pay.

3. Whether a delay of over four and one-half years in bringing this suit constitutes laches.

STATEMENT

Petitioner, a former civilian employee of the Department of the Army, brings this suit for salary from the date of her resignation on March 9, 1951, to the date on which her petition was filed in the Court of Claims, November 21, 1955.

Petitioner was employed as a shorthand reporter at the Brooke Army Medical Center, Fort Sam Houston, Texas (R. 2). On February 27, 1951, she was notified in writing that it was proposed to effect her removal at the close of business on March 31, 1951, for "disloyalty to Brooke Army Medical Center, for wasting government time and money, for creating an adverse effect on morale of the personnel at this Center, and for inefficiency" (Def. Ex. A-6). There followed a ten-page specification of these charges (Def. Ex. A-6). The letter concluded by informing petitioner that she had a right to answer the charges personally and in writing, and to submit any other evidence she desired that would refute the charges (Def. Ex. A-6).

Instead of replying to the charges, petitioner chose, "upon professional advice", to resign, stating in her letter of resignation of March 9, 1951, that she "appreciate[d] the opportunity of having been in contact with a friendly and considerate staff at Brooke" and that she would "always remember the very many kindnesses extended me" (Def. Ex. A-5).

Over four and one-half years later, petitioner brought this suit in the Court of Claims for her salary from the date of her resignation, alleging that she had "resigned under duress" (R. 2). She further alleged that her superiors "wilfully, wickedly and maliciously spread false rumors" about her and addressed her in "foul and profane language"; that this so intimidated her that, when she was told that unless she resigned charges would be filed and sustained against her, she decided to accede to her superiors' request and resigned (R. 2).

The Government moved for summary judgment on the grounds of (1) failure to state a cause of action for illegal removal, (2) failure to exhaust administrative remedies, and (3) laches. The Court of Claims granted the Government's motion on the first two grounds without passing on the third (Pet. App. 8-11).

ARGUMENT

1. Instead of replying to the detailed charges preferred against her in the letter of February 27, 1951, petitioner resigned from her position. She now claims that her superiors spread false rumors about her and called her foul names, all of which

so intimidated her that she was in effect coerced into resigning rather than answering the charges. But apart from the fact that these allegations are belied by her letter of resignation, in which she stated that she was resigning "upon professional advice" and expressed appreciation of the "friendly and considerate staff at Brooke" and for "the very many kindnesses extended me" (*supra*, p. 3), the petition in the Court of Claims does not state a cause of action cognizable in that court.

Only the violation of a valid regulation or an Act of Congress can give petitioner a claim for back pay in the Court of Claims. This she appears to recognize, by basing her petition on the Lloyd-LaFollette Act[1] (Pet. 5-7). However, by resigning, she deliberately withdrew herself from the ambit of that Act. For that Act protects Government employees only in the case of "removal or suspension without pay". 5 U.S.C. 652. It has no application to resignations, as is obvious from the fact that the procedure it prescribes cannot be applied to a resignation.

The Court of Claims has long recognized that claims for back pay based on allegedly coerced resignations do not state a cause of action cognizable in that court. *O'Leary* v. *United States*, 77 C. Cls. 635, involved a situation strikingly similar to the instant case. There, as here, the plaintiff had resigned and was suing for back pay. The petition alleged that the resignation was secured through "evil in-

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[1] Act of August 24, 1912, Section 6, 37 Stat. 555, as amended, 5 U.S.C. 652.

fluence, persuasive argument, false promises and misrepresentations" (77 C.Cls. at 636). The Court of Claims held that it was "without authority to determine the validity of plaintiff's resignation" (77 C.Cls. at 638), and dismissed that count of the petition based on the allegedly invalid resignation.

2. Moreover, by choosing to resign rather than to answer the charges, petitioner has failed completely to invoke the elaborate administrative remedies which the Army had provided, remedies which go well beyond the statutory rights granted civil servants by the Lloyd-LaFollette Act.[2] Petitioner had only to pursue these administrative remedies to insure a full airing of the controversy in which she now seeks back pay. This administrative process, which was designed to protect an employee from dismissal on unfounded charges, began with the answer petitioner was invited to make in the letter of charges of February 27, 1951, and ended with a review by the Secretary of the Army.[3] If petitioner's answer had not been accepted as satisfactory, she could have had a review by the Commanding Officer of the installation at which she was employed.[4] At

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[2] Petitioner could also have requested an investigation by the Civil Service Commission for procedural irregularity. 5 C.F.R. 9.105.

[3] See Appendix C to CPR E2 (November 1948). (Def. Ex. D, p. 32).

[4] Army regulations in effect at the time provided that "An individual who has been separated involuntarily may, within 15 calendar days after receipt of notice of separation (see CPR S1), file a written request for review with the

her request, this review would have included a full-dress hearing at which she could have been represented by counsel, and could have presented oral as well as documentary evidence.[5] If the petitioner were not satisfied with the decision of the Commanding Officer, she would have had the right to request further review by successively higher echelons of the Army.[6] Having chosen to ignore this entire procedure which would have brought the matter to the attention of the appropriate officials, petitioner cannot now take her complaint to court. See *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Unit-*

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commanding officer of the installation under these regulations. . . ." CPR E2 (November 1948) Section 3-2.c. (Def. Ex. D, p. 18).

[5] Army regulations in effect at the time required a complainant to be advised of his or her right to a hearing (CPR E2 (November 1948), Section 6-1.a). (Def. Ex. D, p. 23), and required the Commanding Officer to refer the matter, upon request for a hearing, to a grievance committee (CPR E2 (November 1948), Section 5-3.b) (Def. Ex. D, p. 21). The regulations for conducting the hearing are set out in CPR E2 (November 1948), Section 6 (Def. Ex. D, pp. 23-25). The right to counsel and to present witnesses is provided for in Section 6-1.b (Def. Ex. D, p. 23). The decision of the Commanding Officer is made on the findings and recommendations of the grievance committee. Section 6-3.b (Def. Ex. D, p. 25).

[6] "When the employee is not satisfied with the decision of the commanding officer, he will have the right to request a review of the case by successively higher echelons of review, up to and including the Employee Grievance Board or the Fair Employment Officer, Department of the Army" (CPR E2 (November 1948), Section 7-1.a) (Def. Ex. D, p. 26). The Employee Grievance Board is the representative of the Secretary of the Army.

ed States v. *Sing Tuck*, 194 U.S. 161; *Heffernan* v. *United States*, 133 C. Cls. 839; *Martilla* v. *United States*, 118 C. Cls. 177. To allow the administrative process thus to be by-passed would impose a burdensome liability on the Government while at the same time denying it the opportunity of *in limine* investigating and correcting any impropriety which may have occurred.

3. Finally, petitioner's suit is barred by laches, inasmuch as she delayed over four and one-half years before filing her petition in the Court of Claims. The resignation of which petitioner complains occurred on March 9, 1951 (Def. Ex. A-5). Suit was not filed, however, until November 21, 1955 (R. 1). As a result of this delay, petitioner's claim, at the time her complaint was filed, totaled more than $20,000 (R. 1). In these circumstances, laches is an obvious bar to suit even if the claim were otherwise meritorious. The cases so holding are numerous.[7]

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[7] *Arant* v. *Lane*, 249 U.S. 367 (delay of almost two years); *Nicholas* v. *United States*, 257 U.S. 71, affirming 55 C. Cls. 188 (delay of over three years); *Norris* v. *United States*, 257 U.S. 77, affirming 55 C. Cls. 208 (delay of eleven months); *Zagurski* v. *United States*, 103 C. Cls. 755 (delay of three and one-half years); *Morse* v. *United States*, 59 C. Cls. 139, appeal dismissed, 270 U.S. 151, rehearing denied, 295 U.S. 768 (delay of thirteen months); *Stager* v. *United States*, 57 C. Cls. 116 (delay of nearly six years).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 434255 146